Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

UNITED STATES OF AMERICA EX REL.
JAMES B. KINNEY,

Petitioner,

v.

REBECCA STOLTZ; KELLY SPRATT;
GERALDINE PETERSON; AND JENNIFER PETERSON,

Respondents.

On Petition For Writ Of Certiorari
To The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the sharp conflicts between various circuit courts should now be resolved, concerning the proper interpretation and application of the "original source" provisions of the False Claims Act (31 U.S.C. § 3730(e)(4)), particularly as to the matter of when a *qui tam* action is "based upon" a public disclosure and the nature and quantum of information the relator must possess in order to qualify as an original source.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

JAMES B. KINNEY, an individual suing as a *qui tam* plaintiff or relator pursuant to the False Claims Act (31 U.S.C. § 3730(b)) on behalf of the

UNITED STATES OF AMERICA, real party in interest;

REBECCA STOLTZ, an individual defendant;

KELLY SPRATT, an individual defendant;

GERALDINE PETERSON, an individual defendant; and

JENNIFER PETERSON, an individual defendant.

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BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on May 5, 2003. (App. 27.) Petitioner James B. Kinney ("Kinney") seeks review of that judgment on a writ of certiorari.

Kinney timely filed a petition for rehearing en banc in the Court of Appeals. On July 16, 2003, the Court of Appeals filed an order denying both rehearing and rehearing en banc. (App. 26.) The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

STATUTORY PROVISIONS INVOLVED IN THE CASE

The statutory provisions at issue herein are those of the False Claims Act ("FCA"), (31 U.S.C. § 3729, et seq.), specifically the jurisdictional provisions found at 31 U.S.C. § 3730(e)(4) which state as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4).

STATEMENT OF THE CASE

The public disclosures at issue in the instant case were those made in the first *qui tam* action filed by Kinney in 1997, *United States ex rel. James B. Kinney v. Hennepin County Medical Center and Hennepin Faculty Associates*, 97-CV-1680 RHK/JMM (hereinafter "*Kinney I*").

James Kinney has been a paramedic at Hennepin County Medical Center ("HCMC") for over twenty years. (App. 30.) Based on his daily activities of treating and transporting patients to HCMC in Advance Life Support ("ALS") ambulances, Kinney was personally aware that Medicare patients who were obviously ambulatory, and therefore fully capable of using a means of transport to the

hospital other than an ambulance (such as a bus, taxi or private automobile) were nevertheless routinely transported by ALS ambulance. (App. 30-31.)

Only ambulance transports which are "medically necessary" can properly be charged to Medicare, which by legal definition excludes the transport of patients whose physical condition does not preclude transportation by other means. Consequently, transport of an ambulatory patient who obviously could have gotten to the hospital by bus, taxi or automobile is not "medically necessary" and cannot legitimately be covered by Medicare payment.[1] (App. 43.)

The *Kinney I* complaint alleged that defendant HCMC, with the assistance of defendant Hennepin Faculty Associates ("HFA"), had defrauded the United States by knowingly billing Medicare for ambulance runs which were falsely represented to be medically necessary. (App. 28-29.) Kinney alleged that HCMC was the entity which was responsible for actually submitting the claims in question, a fact which was not disputed,[2] but that the physicians of HFA had assisted in this submission of false claims by failing to properly ascertain the medical necessity of ambulance transports and nevertheless "rubber stamping" certificates of medical necessity, thereby providing ostensible support for HCMC's own conduct in

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[1] See *American Ambulance Serv. of Pennsylvania, Inc. v. Sullivan*, 761 F.Supp. 1211, 1217 (E.D. Pa. 1991); 42 U.S.C. § 1395k(b); § 1395n(a)(2)(b); § 1395x(s)(7); 42 C.F.R. § 410.10(I); § 424.24.

[2] See Appendix 46, wherein the district court in *Kinney I* noted that "[i]t is undisputed that HCMC presented its Medicare claims for the challenged ambulance transports."

knowingly submitting false claims for payment. (App. 11; 45-46; 52.)

HCMC moved for and was granted summary judgment in *Kinney I* on the grounds that, as a municipal entity, it was not a "person" under the False Claims Act and was therefore immune from liability. (App. 11-12; 29.)[3] Kinney's discovery efforts in *Kinney I* nevertheless had confirmed that, just as Kinney had believed and alleged, HCMC did bill Medicare for *every* ambulance run designated "ALS-Minor" (App. 31; 34-35), without any prior effort by HCMC employees to accurately ascertain medical necessity (App. 36), such that HCMC's billings necessarily included those runs which Kinney had personally observed to be "medically unnecessary" as that phrase is defined by statute. (App. 31-32, n. 4; 43.)

Kinney also established that HCMC's computerized billing system had been programmed to automatically convert the code for ALS-Minor on the paramedics' run sheets to a specific Medicare code which *represents* a medically necessary ambulance run, a code which then appeared on the electronic claim form submitted by HCMC to Medicare. (App. 35-36; 51.) Thus, the billing code constituted an implicit false representation that the service in question, the ambulance transport, was a medically necessary service.

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[3] The court's ruling drew upon *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), which involved a state rather than a municipal defendant. Subsequently, this Court held in *Cook County v. United States ex rel. Chandler*, 123 S.Ct. 1239, 1248 (2003) that municipal entities such as HCMC are "persons" liable under the FCA.

Defendant HFA also moved for summary judgment in *Kinney I*. In its August 22, 2001 order granting HFA's motion, the court found that HFA's "assistance" to HCMC in providing certificates of medical necessity was not "material" because it did not *cause* HCMC to submit claims for payment to Medicare. (App. 48-49, n. 13.) The district court reached this result, however, because it further found that Kinney had *successfully proven* that HCMC had indeed submitted payment claims for ALS-Minor runs, *regardless* of the presence or absence of physician certifications of medical necessity:

> Indeed, the evidence presented by Kinney clearly establishes that *HCMC* chose which HCPCS and revenue codes to assign to ALS-Minor ambulance runs. Furthermore, Kinney has successfully established as undisputed fact that HCMC's computerized patient accounting system *automatically* converted the internal ALS-Minor transport code into a HCPCS code and a revenue code that implicitly represented that the ambulance services provided were medically necessary. This conversion occurred regardless of whether the "medical necessity" box on a run sheet has been signed.

(App. 51-52; emphasis in original.)[4]

The court's findings thus confirmed what Kinney had alleged from the outset: that the government was routinely being billed for *all* ALS-Minor transports, with

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[4] See also Appendix 54-55, where the district court reiterated that Kinney had "established" that any statements made to the United States government regarding the medical necessity of the ambulance transports were "inherent in . . . the revenue codes that HCMC had assigned to the ALS-Minor ambulance services."

complete disregard for whether the transports in question were in fact medically necessary.

One point bears particular emphasis, since the circuit court opinion in the instant case somewhat inaccurately states that, "Kinney alleged in *Kinney I* that the doctors were responsible for the fraud." (App. 8.) Certainly *after* HCMC had been dismissed from the case, the focus necessarily turned to the role played by HFA physicians, for the simple reason that HFA was then the only remaining defendant in *Kinney I*. Kinney had, however, never alleged that HFA's physicians were directly responsible for submitting the false claims. Rather, Kinney had identified HCMC as the entity which was directly responsible for knowingly presenting false claims to the government, while HFA facilitated such presentation through the creation of ostensible documentary support for the false representation of medical necessity. (App. 45-46; 52.)

The district court in *Kinney I* did not find that HFA had made no misrepresentations, but rather that any misrepresentations allegedly made by HFA physicians were immaterial because such misrepresentations were not *causally related to* HCMC's misrepresentation via the billing codes. (App. 51-52; 54-55.) Nor was HCMC absolved of fraudulent conduct in *Kinney I*. All that was determined with regard to HCMC was that, as a municipal entity, it was not a "person" subject to liability under the FCA. (App. 29.) *Individual* defendants have, however, always been deemed to be "persons" subject to liability under the Act.

Consequently, on July 17, 2001, Kinney filed the *Kinney II* lawsuit against the *individual* HCMC employees responsible for implementing the deceptive billing system

through which the fraudulent claims had been submitted. (App. 12.) Defendants moved to dismiss on original source grounds and the district court granted their motion, stating that unless Kinney had direct and independent knowledge of the manipulation of the *billing codes*, he could not be deemed to be an original source. (App. 23.)

On appeal, the panel affirmed the trial court's ruling, stating as follows:

> While Kinney may well have had *direct knowledge of the fact that some patients transported by ambulance were not eligible for such transport under Medicare*, there is no evidence in the record that he had direct knowledge of the *appellees'* alleged wrongdoings.

(App. 7-8; emphasis added)

In other words, despite the fact that Kinney unquestionably did have direct and independent personal knowledge that a substantial portion of the ALS-Minor ambulance transports were medically unnecessary, and had been the party who, in *Kinney I*, had publicly disclosed both this true state of affairs *and* the allegation that the government was being defrauded by paying for these improper transports, the Eighth Circuit concluded that Kinney still could not be deemed an "original source" for jurisdictional purposes in *Kinney II* unless he *additionally* and literally had seen "with his own eyes" (App. 7) the manipulation of the billing codes. Thus, the *Kinney II* panel imposed a requirement that the relator must have direct and independent personal knowledge of both the true state of affairs *and* knowledge, again derived from

his own personal observations, of the creation and presentation of the material misrepresentation in order for jurisdiction to be found.

Indeed, the Eighth Circuit panel went even farther by asserting that the *standard* of detail which Kinney was required to meet in making his comprehensive showing of direct and independent knowledge is to be equated to the particularity standard of Federal Rule of Civil Procedure 9(b).[5] (App. 8.) Thus, the Court of Appeals concluded that unless Kinney had provided such detailed information concerning the individual activities of the defendants in *Kinney II* in his *original* complaint in *Kinney I*, and, moreover, with sufficient detail to satisfy Federal Rules of Civil Procedure, Rule 9(b)'s particularity requirements (despite the fact that none of these individuals had been sued in the initial action), he could not be deemed to be an original source in *Kinney II*.

The reasoning of the Eighth Circuit panel sets the jurisdictional bar far higher than Congress ever intended and is further at odds not only with the reasoning of its sister circuits,[6] but even with precedent from within its

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[5] It should be carefully noted that neither in *Kinney I* nor in *Kinney II*, did HCMC or any of its individual employees ever raise a Rule 9(b) specificity challenge with respect to Kinney's complaints. Thus, the Eighth Circuit panel's reference to Rule 9(b) constitutes the creation of a *new* and substantially heightened test for a "direct and independent" knowledge showing, not a finding that Kinney's actual complaint in *Kinney II* lacked specificity.

[6] See *United States ex rel. Springfield Terminal Railroad Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994) and *United States ex rel. Laird and Mayfield v. Lockheed Martin Engineering and Science Services Co.*, 336 F.3d 346 (5th Cir. 2003).

own circuit, *Minnesota Association of Nurse Anesthetists, et al. v. Allina Health System Corp., et al.*, 276 F.2d 1032 (8th Cir. 2002). The decision in Kinney's case therefore stands as a prime example of the kind of serious conflicts which have arisen both between and within individual circuits concerning the proper interpretation and application of the FCA's "original source" jurisdictional provisions, conflicts which are long overdue for this Court's comprehensive review.

ARGUMENT

Introduction

Interpretation and application of the "original source" provisions of the FCA have been problematic issues since 1986, when these provisions first appeared as part of the substantive amendments to the Act undertaken that year by Congress. Although a certain degree of variability in approach is to be expected as courts grapple with newly enacted jurisdictional provisions, in the normal course of events a consensus develops over time as to the proper meaning and application of the statute's terms, which in turn allows potential plaintiffs to make a reasonably accurate assessment of the jurisdictional viability of their own contemplated action *before* filing suit.

That is not, however, what occurred here. Sharply conflicting views concerning these critical provisions have been percolating vigorously throughout the federal judiciary for seventeen years now, and no consensus appears anywhere in sight. Indeed, in a recent California case, where the court sought guidance concerning the state's

own false claims act (modeled after the FCA) by undertaking an exhaustive review of federal authority, the court was ultimately forced to conclude that, "Federal decisional authority is in hopeless conflict" concerning these provisions.[7]

Lacking direct guidance from Congress,[8] or any comprehensive interpretation by this Court, conflicting interpretations have festered, allowing a relator's case to go forward if filed in one circuit, but completely barring an identically placed relator from filing elsewhere. In fact, as this case demonstrates, different panels of the *same* circuit court have issued inconsistent opinions, rendering the question of jurisdiction even more uncertain and unpredictable.

The lack of national uniformity on this question of federal statutory interpretation, and the attendant lack of predictability as to whether jurisdiction will or will not be found in a given case, wastes both the resources of the parties who are forced to litigate this fundamental issue as well as the resources of the judiciary. The public policy interests intended to be served by the FCA are far too important for a question as basic as jurisdiction to be subject to the vagaries of inconsistent application. This case, however, offers an excellent opportunity for this

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[7] *People ex rel. Allstate Insurance Company v. Weitzman*, 132 Cal.Rptr.2d 165, 180-185 (Cal. App. 2003).

[8] It would indeed have been helpful if Congress supplied definitions for phrases such as "based upon," "information" and "allegations," as these key terms are used in the Act, but Congress did not do so in 1986, nor has it seen fit to provide any further clarification in the seventeen years since then.

honorable Court to address a number of the conflicting interpretations which currently plague this area of federal law.

A. The Instant Case Implicates the Conflict Concerning the Meaning of the Key Terms "Information" and "Allegations."

As the Fifth Circuit recently noted:

> The courts of appeal are currently split regarding whether the phrase 'the information on which the allegations are based' refers to information on which the allegations in the qui tam relator's complaint are based or information on which the allegations in the public disclosure are based. The Fourth, Sixth, Eighth and D.C. Circuits have read 'information' in subsection (B) of the 'original source' definition in tandem with the term 'information' in subsection (A) of the public disclosure bar immediately preceding the 'original source' definition. This reading logically leads them to conclude that 'information' in subsection (B) refers to the information on which the publicly disclosed allegations are based rather than the information contained in the relator's qui tam complaint.

United States ex rel. Laird and Mayfield v. Lockheed Martin Engineering and Science Services Co., 336 F.3d 346, 353 (5th Cir. 2003).

Notably, the Eighth Circuit case which the *Laird* court cited as an example of a circuit which construes "information" as used in subsection (B) to refer to the information upon which the publicly disclosed allegations are based was *Minnesota Association of Nurse Anesthetists, et al. v.*

Allina Health System Corp., et al., 276 F.2d 1032 (8th Cir. 2002).[9] In the instant case, however, a different Eighth Circuit panel took the opposite path.

This is a critical distinction. Indeed, in this arena the definitions absolutely determine the jurisdictional outcome. If it is the allegations of fraud made against both HCMC and HFA which were disclosed initially via Kinney's complaint in *Kinney I* of which he must have had "direct and independent knowledge", then there can be no question that Kinney is an original source, since it is undisputed that he personally observed the fully ambulatory condition of many of the ALS-Minor patients he transported (App. 31) and, based on his own observations of the emergency room doctors "rubber stamping" the "medical necessity" certifications on the ambulance run sheets (App. 19), reasonably inferred that Medicare was being billed for such transports, a fact which has never been disputed. (App. 46.)

According to *Minnesota Anesthetists*, no more than this is necessary to demonstrate Kinney's original source status, since that Eighth Circuit case held that a relator need *not* have direct first-hand knowledge of the misrepresentation, but need only have some knowledge of the "true state of facts," which in *Minnesota Anesthetists*, as here, was coupled with a reasonable inference that the suspect claims were being submitted for payment. See *Minnesota Anesthetists*, 276 F.3d at 1050.

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[9] See *Laird*, 336 F.3d at 353, citing to *Minnesota Ass'n of Nurse Anesthetists*, 276 F.3d at 1048.

Thus, according to *Minnesota Anesthetists*, first-hand knowledge of the detailed manner in which the individual defendants had manipulated HCMC's billing system to create the implicit misrepresentation of medical necessity would not be necessary. Indeed, if it is the actual allegations of fraud which had *already* been disclosed via Kinney's initial complaint which must first be looked to, then the information concerning how the billing codes were manipulated, and who did the manipulating, merely fills in additional details of an *already* public allegation.

If, however, it is the "allegations" contained in the complaint in *Kinney II* which constitutes the starting point of the analysis, then quite a different result follows. Without pausing to even address the question of just what had been publicly disclosed in *Kinney I* or just what "allegations" were the proper focus of the analysis, the Eighth Circuit panel immediately narrowed its focus to the allegations in the *complaint* against the *individual* defendants named in *Kinney II*. The panel thus reduced the inquiry to one question, whether Kinney had "direct and independent knowledge" of "the fact that *appellees* engaged in fraudulent conduct." (App. 7; emphasis added.) Consequently, the panel converted the jurisdictional inquiry from one which examines whether the relator had some firsthand knowledge that a fraud against the United States had occurred into an examination of whether the relator had personal knowledge of the specific facts concerning the individual defendants' alleged *liability* for that fraud.

Under *Minnesota Anesthetists*, the district court would have had jurisdiction, yet under *Kinney II* it does not. Where this kind of schism is exhibited *within* a circuit court, this Court's review and guidance is urgently needed,

particularly where the decision here is at odds with the reasoning of the Fourth, Sixth and D.C. Circuits as well.[10]

B. The Instant Case Creates a Conflict Concerning When an Action is "Based Upon" a Public Disclosure.

In this case, Kinney has never disputed that a public disclosure of the fraud against the government occurred via the proceedings in *Kinney I,* but has consistently contended that the disclosures which must be considered are those made throughout the entire proceeding, starting with those made through his own initial complaint in that case.

The Eighth Circuit panel in this case found that Kinney's allegations against the individual defendants were "based upon" the public disclosures made through the discovery process concerning the manipulation of HCMC's billing system, and, finding that Kinney lacked direct and independent of *that* specific information, held that he could not be an original source. (App. 7.)

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[10] See *United States ex rel. Grayson v. Advanced Mgmt. Tech. Inc.*, 221 F.3d 580, 583 (4th Cir. 2000); *United States ex rel. Findley v. FPC-Boron Employees' Club*, 323 U.S. App. D.C. 61, 105 F.3d 675, 690 (D.C. Cir. 1997); *United States ex rel. McKenzie v. Bellsouth Tele., Inc.*, 123 F.3d 935, 943 (6th Cir. 1997). As noted in *Laird*, 336 F.3d at 353-354, the Third, Ninth and Tenth Circuits have construed the "information on which the allegations are based" in subsection (B) to refer to the information contained in the relator's complaint. See *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162 (10th Cir. 1999); *United States ex rel. Mistick v. Housing Auth. of the City of Pitts.*, 186 F.3d 376, 388-89 (3d Cir. 1999); *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993). Thus, this conflict in interpretation has been fully manifested.

Kinney contends, however, that the court cannot artificially narrow its focus to the specific information concerning the billing codes as the "public disclosure" which must be examined, because that information, standing by itself, simply does not constitute a public disclosure of an *allegation* of fraud or a fraudulent *transaction*.[11] See 31 U.S.C. § 3730(e)(4)(A). Without the information which came directly from Kinney's own personal observations, i.e., that a significant number of the ALS-Minor transports were in fact *not* medically necessary, the fact that HCMC's billing codes were set up to automatically and implicitly represent all transports in that category as medically necessary would be completely innocuous information.

Kinney's position is supported by the reasoning of the District of Columbia Circuit in *United States ex rel. Springfield Terminal Railway Co., et al. v. Quinn*, 14 F.3d 645, 652-654 (D.C. Cir. 1994). As that court stated, "Fraud requires recognition of two elements: a misrepresented state of facts *and* a true state of facts." *Springfield*, 14 F.3d at 655; emphasis in original. Thus: "if X + Y = Z, Z represents the *allegation* of fraud and X and Y represent its essential elements," (with X being the misrepresented state of facts and Y the true state of facts), then:

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[11] As a number of cases have noted, the FCA bars suits based on publicly disclosed "allegations or transactions," not publicly disclosed information. (31 U.S.C. § 3730(e)(4)(A).) Consequently, maintaining the clear distinction between actual "allegations and transactions" versus ordinary "information" is a critical analytical point necessary to the "sound interpretation of the FCA." See *United States ex rel. Springfield Terminal Railway Co., et al. v. Quinn*,14 F.3d 645, 653 (D.C. Cir. 1994) and cases cited therein.

> In order to disclose the fraudulent *transaction* publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed. The language employed in § 3730(e)(4)(A) suggests that Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.

Springfield, 14 F.3d at 654; emphasis in original.

In this case, the public disclosure of both the allegation that the government had been defrauded and the nature of the fraudulent transaction (the submission of claims for Medicare payments for transports which were not in fact medically necessary) occurred via Kinney's own complaint in *Kinney I*, and thus long before the specific information concerning the manipulation of the billing code which Kinney later elicited through his discovery efforts. To ignore this reality as the Eighth Circuit panel did in *Kinney II* misidentifies the actual "public disclosure" which must be examined in the first instance and therefore necessarily derails the analysis of whether the relator's action is "based upon" such public disclosure.

Furthermore, because the determination that a *qui tam* action is "based upon" a particular public disclosure in turn defines the universe of "information" from which the relator must demonstrate direct and independent knowledge under subsection (B), the erroneous restriction of the "public disclosure" in question to information which, in isolation, does *not* constitute a revelation of either an allegation of fraud or a fraudulent transaction restricts the relator's ability to make a showing that he did indeed have

some direct and independent knowledge of the "information on which the allegations are based."

By finding that Kinney's suit was "based upon" the disclosures made during the discovery process in *Kinney I*, while completely ignoring the far broader disclosures of the actual allegations of fraud *and* the fraudulent transaction made via Kinney's own initial complaint, the Eighth Circuit panel's decision regarding lack of jurisdiction became a foregone conclusion.

Its decision is in direct conflict with the carefully reasoned approach illustrated by District of Columbia Circuit Court's decision in *Springfield*. It is also in direct conflict with the precedent from within the Eighth Circuit, since the *Minnesota Anesthetists* case, decided one year earlier, relied upon *Springfield*. Thus, in this context as well, the instant case represents both a conflict between circuits and a schism within the Eighth Circuit which renders future jurisdictional questions of this nature arising in the courts of the Eighth Circuit entirely unpredictable.

This conflict is, to be sure, not the only one existing between *or* within circuit courts concerning the proper interpretation of the key phrase "based upon." Indeed, the *Minnesota Anesthetists* case includes a lengthy discussion of the conflict between the Fourth Circuit's interpretation of this phrase to mean "derived from" a public disclosure, a view followed by "one panel of the Seventh Circuit (in schism with another panel)," versus the majority view which holds that a relator's action is "based upon" a public disclosure "whenever the allegations in the suit and in the disclosure are the same." *Minnesota Anesthetists*, 276 F.3d

at 1044-1045. As that court further noted, however, in those circuits which do follow the majority view, this question has "provoked spirited disagreement" (*Minnesota Anesthetists*, 276 F.3d at 1044, n. 8), such that even in these circuits the issue has been laid to an uneasy rest at best.

As this case illustrates, a misstep in the analytical assessment of what "public disclosure" the relator's case is truly "based upon" is a make-or-break issue in determining jurisdiction. While the federal circuits remain in serious conflict on the proper interpretation and application of this key step in the analysis, a wholly unacceptable level of uncertainty regarding jurisdiction over these suits will continue to fester throughout the federal system. For this reason as well, this Court's review is warranted.

C. The Instant Case Also Implicates a Conflict Concerning the Quantum of "Direct and Independent" Information the Relator Must Possess.

The Eighth Circuit panel's decision also creates a conflict concerning just how much "direct and independent" knowledge a relator must possess in order to qualify as an original source. The upshot of the decision herein was that it was not *enough* that Kinney had direct and independent knowledge that many of the ALS-Minor transports of Medicare patients were medically unnecessary and that he *correctly* inferred from his observations of the HFA doctors that these transports were nevertheless being billed. The panel in this case set forth an additional requirement that Kinney must have had "direct and independent" awareness, literally through observations made "with his own eyes" (App. 7), of the individual defendants' "alleged wrongdoings," i.e., the assertion of the

misrepresented state of facts through the electronic billing. (App. 8.)

This would require Kinney to have personal knowledge of all the ingredients of the fraud, the true state of affairs *and* the misrepresentation. In *Springfield,* however, the court stated that subsection (B) "does not require that the *qui tam* relator possess direct and independent knowledge of *all* of the vital ingredients to a fraudulent transaction." *Springfield*, 14 F.3d at 657-658. In *Minnesota Association of Nurse Anesthetists, et al. v. Allina Health System Corp., et al.*, 276 F.2d 1032 (8th Cir. 2002), the court followed *Springfield*:

> . . . [T]o qualify as an original source, a relator *does not* have to have personal knowledge of all elements of a cause of action. *Springfield Term. Ry.,* 14 F.3d at 656-657. . . . A false claim consists of a representation contrary to fact, made knowingly or recklessly. If the relator has direct knowledge of *the true state of facts*, it can be the original source, *even though its knowledge of the misrepresentation is not first-hand.* Id.

Minnesota Anesthetists, 276 F.3d at 1050; emphasis added.

The result reached here, which erroneously required the relator to have direct and independent knowledge of *all* the essential elements of the fraud, simply cannot be reconciled with this Seventh and Eighth Circuit authority. Indeed, as discussed below, it cannot be reconciled with congressional intent or with the False Claims Act itself.

D. The Appellate Court's Decision Is Directly Contrary to Congressional Intent.

Nothing in the legislative history of the FCA suggests that Congress ever intended that relators were to be required to show direct and independent knowledge of all the essential elements of the fraud in order to qualify as an original source. To the contrary, the legislative history reflects that a relator was considered to be "an original source if he had *some* of the information related to the claim," and that such a person was deemed to have "the *right* to bring an action after these disclosures are made public as long as [the *qui tam* action] is filed before an action is commenced by the government."[12] Indeed, Congress crafted a portion of the statute's awards provision to specifically address this fact:

> Where the action is one which the court finds to be based *primarily* on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a . . . civil . . . hearing, . . . the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation.

31 U.S.C. § 3730(d).

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[12] 132 Cong. Rec. H29322 (daily ed. October 7, 1986); emphasis added.

Thus, the quantum of direct and independent knowledge which the relator brings to the table need not even be the *majority* of the information upon which the relator's action rests. Even where the relator personally contributed only a small minority of the information necessary to the case, Congress nevertheless considered such a relator to have more than adequate original source status.[13]

The Eighth Circuit panel's creation of a test which not only would require the relator to have personal knowledge of both the true state of affairs *and* the misrepresentation, but which moreover imposes a requirement that the *showing* of such direct and independent knowledge must be made with the specificity which Federal Rule of Civil Procedure 9(b) applies to complaints alleging fraud, is incompatible with both the legislative history of the 1986 amendments and the express language of the FCA. For this reason as well, this Court's review is warranted.

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[13] The legislative history of 31 U.S.C. § 3730(d) forcefully underscores this point. As Senator Grassley, one of the sponsors, explained:

> When the qui tam plaintiff brings an action based on public information, meaning he is an 'original source' within the definition under the act, but the action is based primarily on public information not originally provided by the qui tam plaintiff, he is limited to a recovery of not more than 10 percent. In other words, a 10 percent cap is placed on those 'original sources' who bring cases based on information already publicly disclosed where *only an insignificant amount* of that information stemmed from that original source.

132 Cong. Rec. S28580 (daily ed. October 3, 1986); emphasis added. See also 132 Cong. Rec. H29322 (daily ed. October 7, 1986).

CONCLUSION

In the exercise of its ongoing task of interpreting federal law, the time has come for this Court to bring its focus to bear on this confused area of the False Claims Act litigation. Conflicts not only between but *within* individual circuits have left a class of plaintiffs who have undertaken suits on behalf of the government under the False Claims Act at sea in a rudderless craft.

In this important area of law, where the interest in protecting the public fisc from fraudulent depredations is directly implicated, the *qui tam* plaintiff should not be forced to guess at the rules which will govern a matter as fundamental as jurisdiction, nor should the trial court's jurisdiction turn upon which circuit the case is filed in, or the happenstance of which three-judge panel within a circuit ultimately rules upon the jurisdictional question.

A single, clear and coherent approach is vitally necessary here, and such an approach can only be articulated pursuant to this Court's supreme authority. Therefore, Petitioner Kinney prays that the Court grant this petition and permit these matters to be fully presented for review.

Respectfully submitted,

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October 2003

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-2193

United States of America ex rel. James B. Kinney, Appellants,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
Rebecca Stoltz, an individual; Kelly Spratt; Geraldine Peterson, an individual; Jennifer Peterson, an individual, Appellees.	*	

Submitted: February 14, 2003

Filed: May 5, 2003

Before WOLLMAN, HEANEY and MELLOY, Circuit Judges.

HEANEY, Circuit Judge.

This is an appeal from a dismissal of a second qui tam action brought on behalf of the United States by James

Kinney pursuant to the False Claims Act,[1] 31 U.S.C. §§ 3729-3733. The complaint alleged that appellees Rebecca Stoltz (Stoltz), Kelly Spratt (Spratt), Geraldine Peterson (G. Peterson), and Jennifer Peterson (J. Peterson), four Hennepin County Medical Center (HCMC) employees, knowingly and falsely defrauded the United States by improperly claiming all ambulance transports as medically necessary. The district court[2] dismissed Kinney's claim, and we affirm.

I.

James Kinney, a paramedic at Hennepin County Medical Center since 1983, filed a qui tam lawsuit against HCMC and Hennepin Faculty Associates (HFA) in 1997. After the government chose not to intervene in this action, Kinney proceeded with the case, alleging that HCMC and HFA falsely certified all ambulance services it provided as medically necessary, and in the process defrauded the United States by billing Medicare for ambulance runs that should not have been billed as necessary. The runs Kinney claimed as fraudulent were termed "ALS-Minor," which signified ambulance runs for emergencies that did not require ambulance support. Kinney's claim focused on the

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[1] The False Claims Act allows for qui tam actions, in which a private party, known as a relator, brings an action on behalf of the United States alleging fraudulent claims were submitted to the government. 31 U.S.C. § 3730(b)(4). The private party may recover damages and attorneys fees if the claim is successful, but it is required to first deliver a copy of its complaint to the United States, which may intervene if it chooses to pursue the claim. *Id.*

[2] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota.

lower right-hand corner of the ambulance run sheet, which stated "I certify that it was medically necessary to transport this patient by ambulance," and provided space for the attending physician's signature. Kinney alleged that HFA physicians would sign and certify virtually all ambulance runs as medically necessary, and HCMC received Medicare reimbursement for them.

The case against HCMC was dismissed with prejudice because HCMC was not a "person" subject to liability under the False Claims Act. See *Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 787-88 (2000) (holding a state is not a person for purposes of qui tam liability). No appeal was taken from the dismissal. The case proceeded against HFA. During discovery, Kinney deposed eight HCMC employees, including: Stoltz, Billing Manager for HCMC; J. Peterson, HCMC's director of Emergency Medical Services and G. Peterson, the manager of Ambulance Services.[3] The depositions disclosed that Stoltz and G. Peterson had discoverable information. Prior to the depositions, Kinney never indicated that he knew of their existence, or about any alleged misdeeds committed by them.

On August 22, 2001, the district court granted summary judgment to HFA. *United States ex rel. Kinney v. Hennepin County Med. Ctr.,* 2001 WL 930780 (D. Minn. Jan. 22, 2001) (*Kinney I*). It held that Kinney failed to establish that the physicians' signing of the ambulance

[3] Spratt replaced G. Peterson as Manager of Ambulance Services, who left HCMC in April 2000. Spratt was not deposed in *Kinney I*, as all events pertinent to the lawsuit occurred prior to her current position with HCMC.

run sheets were the cause of the alleged fraud. No appeal was taken from this judgment.

On July 17, 2001 Kinney filed the present qui tam action against Stoltz, J. Peterson, G. Peterson, and Spratt. He alleged they made false claims against Medicare for the reimbursement of ambulance runs. Specifically, Kinney alleged: (1) that Spratt and the Petersons instructed HCMC administrative clerks to try to obtain physicians' medical necessity certifications for all ambulance runs for patients delivered to HCMC; (2) they set HCMC's automated accounts system to assign a billable number to all ALS-Minor transports of Medicare patients; and (3) Stoltz recklessly submitted false claims to Medicare for HCMC in order to obtain compensation involving all ambulance runs, regardless of their medical necessity or merit. The appellees moved to dismiss the action, arguing the court lacked subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) because the claims asserted came from information publicly disclosed during *Kinney I*, or alternatively the doctrines of res judicata and collateral estoppel precluded the present action.

The district court concluded Kinney did not have "direct knowledge" of the allegations or transactions constituting the alleged violation, namely HCMC's alleged manipulation of the billing codes relating to ALS-Minor ambulance transports. Finding Kinney was neither involved in nor a close observer of the alleged illegal act, the district court determined that Kinney received his information from the depositions of the HCMC employees, and because he was not a direct source of the information, it held his claim was not permitted under the False Claims Act. *United States ex rel. Kinney v. Stoltz*, 2002 WL 523869 at *6, *7 (D. Minn. Apr. 5, 2002) (*Kinney II*). Further,

Kinney failed to show that he had made a voluntary disclosure to the government relating to the acts of the four named defendants, and therefore failed to fully comply with the statute. *Id.* at *7. Finally, the district court determined that, even if Kinney had been found to have "direct and independent knowledge" of the facts underlying the allegations, the suit would have been barred because it was in essence against the four defendants in their official capacities, and thus a suit against HCMC, which is barred by the False Claims Act. *Id.* n.3[4] The district court dismissed Kinney's case with prejudice. This appeal followed, with the United States filing an *amicus curiae* brief.

II.

We review a district court's order granting a motion to dismiss de novo. *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001). A district court ruling on a motion to

[4] The district court also denied Kinney's attempt to amend his complaint, noting that Fed. R. Civ. P. 15(a) requires leave of the court to amend a complaint once a "responsive pleading" had been served. Kinney argued that: (1) a motion to dismiss did not constitute a responsive pleading; and (2) a party can "amend as a matter of course" to add a new defendant. *Kinney II*, *3. The First Amended Complaint sought to add Hennepin County as a defendant because of the County's decision to offer indemnification to the individual defendants, which occurred after the original complaint was served. Our circuit has noted that supplemental pleadings, not amended pleadings, are intended to cover matters occurring after the original complaint is filed. *United States v. Vorachek*, 563 F.2d, 884, 886 (8th Cir. 1997). Rule 15(d) gives the district court discretion to permit parties to serve supplemental pleadings. Kinney cannot supplement his complaint as a matter of right. We think the district court properly recited the law, and was within its discretion when it did not accept the amended complaint.

dismiss must accept the allegations contained in the complaint as true, and all reasonable inferences from the complaint must be drawn in favor of Kinney as the source of all relevant allegations in the current action. *Hafly v. Lohman,* 90 F.3d 264, 267 (8th Cir. 1996).

Under the False Claims Act,[5] federal courts do not have jurisdiction over an action based upon public disclosure of allegations or transactions unless the person bringing the action "is an original source of the information." A person is the "original source" when they have "direct and independent knowledge of the information" which formed the basis of the allegations. § 3730(e)(4). Our circuit has adopted a three-part test to determine this issue: "(1) Have allegations made by the relator been 'publicly disclosed' before the qui tam suit was brought? (2) If so, is the qui tam suit 'based upon' the public disclosure? and (3) If so, was the relator an 'original source' of the

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[5] The relevant portions of the statute are:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4).

information on which the allegation was based?" *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Systems Corp.*, 276 F.3d 1032, 1043 (8th Cir. 2002).

At the center of this appeal lies the question: What did James Kinney know? Although the parties offer very different accounts of what Kinney did know, could know, or should have known, one immutable truth remains: either Kinney had direct knowledge of the fact that the appellees engaged in the fraudulent conduct, or he did not. If he did not have direct knowledge of the facts underlying this lawsuit, then he is not an original source of the information in this lawsuit and this court lacks jurisdiction.

A relator has direct knowledge when he sees it with his own eyes. *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 703 (8th Cir. 1995). The False Claims Act is intended to encourage individuals who are either close observers or involved in the fraudulent activity to come forward, and is not intended to create windfalls for people with secondhand knowledge of the wrongdoing. *Hays v. Hoffman*, ___ F.3d ___, 2003 WL 1825040, at *1 (8th Cir. April 9, 2003). Our circuit has not previously addressed the question of specificity in pleading claims under the False Claims Act. Every other circuit to address this issue has held that since the False Claims Act is obviously an anti-fraud statute, complaints brought under it must comply with Fed. R. Civ. P. 9(b). *See United States ex rel. Totten v. Bombardier*, 286 F.3d 542, 551-553 (D.C. Cir. 2002); *Bly-Magee v. California* 236 F.3d 1014, 1018 (9th Cir. 2001); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997); *Gold v. Morrison-Knudson Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995). Rule 9(b) requires that "all averments of fraud . . . shall be stated with particularity." While Kinney

may well have had direct knowledge of the fact that some patients transported by ambulance were not eligible for such transport under Medicare, there is no evidence in the record that he had direct knowledge of the appellees' alleged wrongdoings. Kinney alleged in *Kinney I* that the doctors were responsible for the fraud. He made no mention of the appellees in *Kinney II* and there is no evidence in the *Kinney I* record that he was aware of the role played by the appellees until after discovery. If Kinney had possessed direct knowledge of the asserted fraud in *Kinney II*, he was obligated to identify them in his initial complaint. *Accord United States ex rel. Butler v. Magellan Health Services, Inc.*, 101 F. Supp. 2d 1365, 1368 (M.D. Fla. 2000) ("When pleading fraud, the plaintiff should generally identify the individuals who made the alleged misrepresentation, the time of the alleged fraud and the place of the alleged fraud."). We agree with the district court that Kinney was not the original source of the allegations on which *Kinney II* is based; thus, the district court lacked jurisdiction pursuant to 21 U.S.C. § 3730(e)(4)(A).[6]

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[6] This district court held in the alternative that even though Kinney alleged he was suing the appellees in their individual capacity, he was actually suing them in their official capacity, because all their acts were in connection with their official duties. *Kinney II*, 2002 WL 523869, *7 n.3. Thus, the action was in reality against HCMC, which cannot be sued under the False Claims Act. We see no need to consider whether Kinney was suing the appellees in their official or individual capacity, or whether in this case they could be sued in their individual capacity, in light of our holding that Kinney was not the original source of the suit and the district court did not have jurisdiction. See *United States ex rel. Gaudineer & Comito v. Iowa*, 269 F.3d 932, 937 n.3 (8th Cir. 2001).

III.

For the foregoing reasons, we affirm.

UNITED STATES OF AMERICA
DISTRICT OF MINNESOTA

United States of America,
ex rel. James B. Kinney,

Plaintiff,

v.

Rebecca Stoltz, an individual, Kelly Spratt, an individual, Geraldine Peterson, an individual, and Jennifer Peterson, an individual,

Defendants.

Civil No. 01-1287 (RHK/JMM)
MEMORANDUM OPINION AND ORDER

(Filed Apr. 05, 2002)

Gary A. Weissman, Weissman Law Offices, Minneapolis, Minnesota; Phillip E. Benson, Warren Benson Law Group, Anaheim Hills, California; and Donald R. Warren, Warren Benson Law Group, San Diego, California, for Plaintiff.

David T. Schultz and Kari L. Jahnke, Halleland, Lewis, Nilan, Sipkins & Johnson P.A., Minneapolis, Minnesota for Defendants.

Introduction

Before the Court in this *qui tam* action are three motions. Defendants Rebecca Stoltz, Kelly Spratt, Geraldine Peterson, and Jennifer Peterson, all of whom are or were employees of Hennepin County working at Hennepin County Medical Center, have asked the Court to take judicial notice of several categories of documents and have moved to dismiss Plaintiff James B. Kinney's Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal

Rules of Civil Procedure. For his part, Kinney seeks the entry of default against Hennepin County, which appears as an additional defendant on the "First Amended Complaint" that Kinney filed after the Defendants filed their motion to dismiss.

Background

The present lawsuit is related to *qui tam* litigation previously before the Court in the matter captioned *United States ex rel. Kinney v. Hennepin County Medical Center et al*, Civ. No. 97-1680 ("*Kinney I*"). In *Kinney I*, *qui tam* relator Kinney, a Hennepin County paramedic, complained that Hennepin County Medical Center ("HCMC") had knowingly and falsely represented to the United States that certain medically *unnecessary* ambulance transports were "medically necessary" and thus eligible for reimbursement by Medicare. Kinney alleged that HCMC accomplished these false representations by obtaining false certifications of medical necessity from the physicians whom Hennepin Faculty Associates ("HFA") provides to staff the emergency room.

On January 22, 2001, this Court dismissed HCMC from *Kinney I* on the grounds that HCMC, a county governmental entity, did not fall within the scope of the term "person" as used in the False Claims Act. The Court reasoned that, because (a) the False Claims Act imposes treble damages that are essentially punitive in nature and (b) Congress did not expressly authorize the imposition of punitive damages on governmental entities, the common-law presumption that punitive damages may not be imposed on a governmental entity applies to exclude HCMC from the scope of the term "person" under the

False Claims Act. The Court expressly determined that there was no just reason for delay and directed the entry of judgment as to HCMC pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Kinney did not appeal from that judgment.

Kinney I proceeded against HFA, and Kinney deposed eight HCMC employees, including the four defendants in the present action. At the close of discovery, HFA moved for summary judgment. Kinney cross-moved for partial summary judgment. A hearing was held on the parties' summary judgment motions in *Kinney I* on July 6, 2001.

On July 17, 2001, relator Kinney filed the present *qui tam* action against the four individual defendants: Rebecca Stoltz, Jennifer Peterson, Geraldine Peterson, and Kelly Spratt. Stoltz is the Billing Manager for HCMC. Jennifer Peterson is HCMC's former director of Emergency Medical Services. Spratt is the current Manager of Ambulance Services, replacing Geraldine Peterson, who no longer works for HCMC.

By a Memorandum Opinion and Order dated August 22, 2001, this Court granted summary judgment to HFA in *Kinney I*, concluding from the undisputed facts in the record that Kinney's False Claims Act claims against HFA failed for lack of causation:

> [A]ny statements made to the United States government (or any state agency distributing federal funds) regarding the "medical necessity" of ambulance transports were inherent in the HCPCS and revenue codes that HCMC assigned to the ALS-Minor ambulance services. Those codes were assigned regardless of whether an emergency room physician had signed the "medical necessity" block on the ambulance run

> sheet. The presence or absence of a signature on a run sheet had no effect on, and no tendency to effect, whether the claim was paid by Medicare or Medicaid.

Aug. 22, 2001 Mem. Op. and Order at 27; *see also id.* at 24. Final judgment was entered in *Kinney I* on August 22, 2001. Kinney did not appeal from the final judgment.

On September 6, 2001, the United States declined to intervene in the above-captioned *qui tam* action. The Defendants were served with the Complaint in the present action between October 5 and October 10, 2001. (Original Summons and Returns of Service (Doc. No. 8).) On October 23, 2001, Hennepin County extended to the individual defendants the right to indemnification under the County's Indemnification Plan. On October 24, 2001, Defendants moved to dismiss the Complaint on the grounds that (a) this Court lacks subject matter jurisdiction under rule 12(b)(1) because the claims asserted in this action came from information that was publicly disclosed during the *Kinney I* litigation, and (b) the Complaint fails to state a claim under Rule 12(b)(6) because res judicata and/or collateral estoppel preclude the present suit against the individual defendants.

On November 27, 2001, Kinney's counsel delivered a copy of a "First Amended Complaint" in this matter to Defendants' counsel. The "First Amended Complaint" only adds to the original Complaint; it does not delete any substantive allegations. In both the original Complaint and the "First Amended Complaint," Kinney alleges that the four individual defendants violated the False Claims Act by billing Medicare for medically unnecessary "ALS Minor" ambulance transports – transports for which Medicare reimbursement is allegedly not available.

Kinney further alleges that the individual defendants violated the False Claims Act by billing Medicare for ambulance transports for which no medical necessity certification form had been signed by an emergency room physician. By his "First Amended Complaint," Kinney also adds Hennepin County as a party and adds a third count seeking relief specifically against the County. Kinney prays for a declaration that, because the County has offered indemnification coverage to the four individual defendants for this lawsuit, it has waived its immunity from liability for punitive damages and Kinney may therefore bring claims against the County under the *qui tam* provisions of the False Claims Act.

On December 11, 2002, the Court directed the parties to file supplemental post-hearing briefs on whether Kinney's filing of the "First Amended Complaint," done without leave of the Court after the Defendants filed the Motion to Dismiss, is effective pursuant to Rule 15(a). The Court also directed counsel to address the impact of the "First Amended Complaint" on the pending Motion to Dismiss, assuming the Complaint has been amended.

Analysis

I. Plaintiff's "Amendment" of the Complaint

Kinney contends that Rule 15(a) permits him to "amend" his Complaint as a matter of right to add Hennepin County as a party defendant and obtain a declaration that Hennepin County has waived its immunity from punitive damages. Rule 15(a) of the Federal Rules of Civil Procedure provides that:

> a party may amend the party's pleading once as a matter of course at any time before a

> responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. 15(a). In response to the Court's request for supplemental briefing, the Defendants raise two issues regarding the effectiveness of Kinney's "amendment" of his Complaint: (1) whether a motion to dismiss constitutes a "responsive pleading" that forecloses amendment "as a matter of course," and (2) whether a party can amend "as a matter of course" to add a new party defendant.

Rule 15 facilitates both the amendment of pleadings and the filing of supplemental pleadings.

> The distinction between an amended pleading under Rule 15(a) and a supplemental pleading under Rule 15(d) of the Fed. R. Civ. P. has been stated as follows: "An amended pleading is designed to include matters occurring before the filing of the bill but either overlooked or not known at the time. A supplemental pleading, however, is designed to cover matters subsequently occurring but pertaining to the original cause."

United States v. Vorachek, 563 F.2d 884, 886 (8th Cir. 1977) (quoting *Berssenbrugge v. Luce Mfg. Co.*, 30 F. Supp. 101 (W.D. Mo. 1939)); *see also* 3 *Moore's Federal Practice* § 15.02[1] at 15-8 to -9 (3d ed.); Fed. R. Civ. P. 15(d) (stating that a supplemental pleading "set[s] forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."). Thus, a party may supplement a pleading under Rule 15(d) to add new parties when events occurring after the original pleading has been filed make it necessary to do so. *See*

Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 227 (1964).

The distinction between supplemental pleadings and amended pleadings is more than one of mere nomenclature. A party has no right under Rule 15 to *supplement* its pleading as a matter of course: "*Upon motion of a party* the court may, *upon reasonable notice and upon such terms as are just*, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d) (Emphasis added). The "First Amended Complaint" adds Hennepin County as a party and seeks relief as against the County based upon the County's decision to offer indemnification to the individual defendants – an event that occurred after the original Complaint was filed and served. The "First Amended Complaint" is therefore a supplemental pleading, not an amended pleading, and leave of Court was required before it could be filed. No leave was obtained and the document shall therefore be stricken from the file.[1]

II. Defendants' Request for Judicial Notice

Defendants have moved the Court to take judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence, of three categories of documents: (1) the entire court record in *Kinney I*; (2) certain documents obtained

[1] Accordingly, Kinney's request for the entry of default against Hennepin County for failing to answer or otherwise respond to the First Amended Complaint is moot and will be denied as such.

from the Office of the Minnesota Attorney General pursuant to a Minnesota Government Practices Act request; and (3) letters of indemnification issued to the four defendants here by the Hennepin County Board of Commissioners. A trial court "shall take judicial notice if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d). Rule 201 governs only the judicial notice of "adjudicative facts."[2] Fed. R. Evid. 201(a); *Qualley v. Clo-Tex Int'l Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000). The sort of adjudicative fact about which a trial court may take judicial notice is "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

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[2] The Eighth Circuit discussed the scope of Rule 201 as follows:

> The advisory committee notes to Rule 201 distinguish between "adjudicative facts" and "legislative facts." *See id.*, adv. ette. [sic] notes (citing 2 Kenneth Davis, *Administrative Law Treatise* at 353 (1958)). Adjudicative facts are "facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses." *Id*; *see also U.S. v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976) (stating that adjudicative facts concern "who did what, where, when, how and with what motive or intent.") (quoting 2 Kenneth Davis, *Administrative Law Treatise* § 15.03 at 353 (1958)). By contrast, "[l]egislative facts do not relate specifically to the activities or characteristics of the litigants. A court generally relies upon legislative facts when it purports to develop a particular law or policy and thus considers material wholly unrelated to the activities of the parties." *Gould*, 536 F.2d at 220.

Qualley v. Clo-Tex Int'l Inc., 212 F.3d 1123, 1128 (8th Cir. 2000).

The Court clearly can take judicial notice of the Orders it issued in *Kinney I*, the pleadings therein, and the motion papers filed with the Court by the parties. In light of the Court's analysis of its subject matter jurisdiction, *infra*, it need not consider whether it is appropriate to take judicial notice of the other categories of documents.

III. Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction

The Court begins its analysis of the Defendants' Motion to Dismiss with the question of whether this Court has subject matter jurisdiction to consider the claims before it. Defendants argue that this Court lacks jurisdiction over the present action because Kinney's lawsuit runs afoul of the "public disclosure" provisions of the False Claims Act, § 3730(c)(4). Section 3730(e) bars the federal courts from exercising jurisdiction over certain actions, including

> an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). Defendants contend that Kinney's claims in this action are based upon HCMC's billing and electronic claims submission practices, and that Kinney learned about those practices through discovery in *Kinney I*, which constituted "public disclosure" in a "civil hearing." Defendants further contend that Kinney did not have direct and independent knowledge of that

information before he brought the present lawsuit and, therefore, is not an "original source" of the information.

A. Public disclosure in a civil hearing of allegations or transaction upon which the present qui tam action is based

In arguing that there was no public disclosure of the "allegations or transactions" underlying his present *qui tam* action, Kinney relies on *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). In *Springfield*, the court of appeals distinguished between "allegations or transactions" and ordinary "information," concluding that not all information in the public domain rises to the level of "allegations or transactions." Rather, the court of appeals observed that "Congress sought to prohibit *qui tam* actions *only* when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain." *Springfield*, 14 F.3d at 654 (emphasis in original). Kinney argues that the facts regarding HCMC's billing and Medicare claims submission practices about which he learned in discovery in *Kinney I* are mere "information" and not essential elements of his allegations or transactions of fraudulent conduct. The Court disagrees.

In *Kinney I*, the emergency room physicians' signatures on the certifications of medical necessity were the focus of Kinney's allegations or transactions of fraudulent conduct. In support of his motion for partial summary judgment in *Kinney I*, Kinney averred that he witnessed doctors signing the run sheets in large batches in the emergency room. Kinney further averred that "HFA makes it all possible by having its physicians falsely certify ALS-Minor ambulance runs as 'medically necessary' when they

do not meet either the Medicare or Medicaid criteria for medically necessary." (Relator Aff. ¶ 10.) At the hearing on the cross-motions for summary judgment in *Kinney I*, the Court questioned how the signatures of HFA doctors on ambulance run sheets could have caused false claims to be paid or false statements to have been made, as Kinney had alleged. The Court observed that the undisputed evidence in the record established that HCMC's computerized billing system *automatically* converted the code for "ALS Minor" ambulance runs to HCPCS codes which implicitly represent that the ambulance runs were medically necessary. Furthermore, those HCPCS codes were assigned regardless of whether the run sheets for the "ALS Minor" runs bore a physician's signature in the medical necessity block. The very concerns this Court raised at the hearing about Kinney's case against the HFA are the essential allegations of the fraud asserted by Kinney in his current *qui tam* lawsuit.

The discovery relating to HCMC's billing and electronic claims filing procedures was filed with the Court in connection with HFA's motion for summary judgment, and an open *hearing* on HFA's and Kinney's cross-motions for summary judgment was held eleven days before Kinney brought the present *qui tam* action against the individual defendants. The July 6 summary judgment hearing was open to the public. A transcript of the hearing was prepared and has been available in the Clerk of Court's office as part of the record in the *Kinney I* proceedings. The documents filed in connection with the summary judgment motions and the hearing itself on those motions undoubtedly constitutes "public disclosure" in a "civil hearing" of the essential allegations or transactions of allegedly

fraudulent conduct upon which Kinney has based the July 17 Complaint.

The Eighth Circuit has explicitly endorsed the position, taken by the majority of circuits, that a *qui tam* suit is "based upon" a public disclosure "whenever the allegations in the suit and the disclosure are the same, 'regardless of where the relator obtained his information.'" *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1045-47 (8th Cir. 2002) (quoting *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992)). Here the public disclosures made in connection with *Kinney I* and the allegations in the *Kinney II* lawsuit are the same. Thus, Kinney can avoid the jurisdictional bar of § 3730(e)(4)(A) only if he is an "original source" of the information within the meaning of § 3730(e)(4)(B).

B. "Original Source" of the Information on which the Allegations of Fraud are Based

Congress defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B). The words "direct" and "independent" are intended to express two ideas, rather than one. *Minnesota Ass'n of Nurse Anesthetists*, 276 F.3d at 1048. "'Direct knowledge' under the False Claims Act has been defined as knowledge that is 'marked by an absence of an intervening agency.'" *United States ex rel. Barth v. Ridgedale Elec. Inc.*, 44 F.3d 699, 703 (8th Cir. 1995); *see also United States ex rel. Stinson, Lyons, Gerlin*

& Bustamante, P.A. v. Prudential Life Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991). " 'Independent knowledge' has been consistently defined as knowledge that is not dependent upon public disclosure." *Barth*, 44 F.3d at 703.

Section 3730(e)(4)(B) does not require Kinney to have personal knowledge of each and every discrete piece of information supporting his allegations of fraud. *See Minnesota Ass'n of Nurse Anesthetists*, 276 F.3d at 1050. Kinney argues that he need not have direct and independent knowledge of HCMC's assignment of the billing codes that facilitated the electronic submission of the allegedly false claims for payment by the Government. He contends that it is sufficient if he had direct and independent knowledge of the fact that: (1) certain ambulance transports to HCMC, classified as "ALS Minor" runs based upon the nature of the injury or illness presented by the patient, are not "medically necessary" as that term is defined by Medicare, and (2) some patients transported to HCMC on "ALS Minor" runs had Medicare health insurance coverage. (Pl.'s Mem. Opp'n Mot. to Dismiss at 6-7.)

The Eighth Circuit has discussed at length what constitutes "direct knowledge" of fraud:

> A relator is said to have direct knowledge of fraud when he "saw [it] with his own eyes." The direct knowledge requirement was intended to avoid parasitic lawsuits by "disinterested outsider[s]" who "simply stumble across an interesting court file." Instead, the Act seeks to encourage persons with "*firsthand* knowledge of fraudulent misconduct," . . . or those "who are either *close observers* or *otherwise involved* in the fraudulent activity" to come forward. . . . Accordingly, "collateral research and investigations . . .

> [do] not establish 'direct and independent knowledge of the information on which the allegations are based within the meaning of § 3730(e)(4)(B).'"

Barth, 44 F.3d at 703 (emphasis in original) (internal citations omitted). A review of the Complaint in this matter, and the facts Kinney has identified as being known to him through first-hand observation, demonstrates that Kinney did not have "direct knowledge" of the allegations or transactions constituting the alleged FCA violations – namely, HCMC's alleged manipulation of billing codes relating to "ALS-Minor" ambulance transports. Kinney was neither *involved in*, nor a *close observer* of, the activities that allegedly constitute the fraud perpetrated by the Defendants. *Compare Minnesota Ass'n of Nurse Anesthetists*, 276 F.3d at 1050 (determining that nurse anesthetists had direct knowledge where they often saw the anesthesiologist filling out forms used for billing with misleading information). Kinney derived his information concerning the alleged fraudulent transactions from the depositions of HCMC employees. "As such, he was a recipient of information and not a direct source." *Barth*, 44 F.3d at 704.

Even if Kinney can be found to have "direct and independent knowledge" of the allegations underlying the present *qui tam* action, he has not established that he satisfied the last statutory condition for qualifying as an original source. Section 3730(e)(4)(B) also requires the relator to have "voluntarily provided the information to the Government before filing an action under this section which is based on the information." Kinney asserts that he provided information to the Government prior to *the first*

lawsuit against HCMC and HFA, consisting of his knowledge that: (1) certain ambulance transports to HCMC, classified as "ALS Minor" runs based upon the nature of the injury or illness presented by the patient, are not "medically necessary" as that term is defined by Medicare, and (2) some patients transported to HCMC on "ALS Minor" runs had Medicare health insurance coverage. (Pl.'s Mem. Opp'n Mot. to Dismiss at 6 -7.) Kinney has not shown that he made any voluntary disclosure to the Government relating to the acts allegedly perpetuated by the Defendants here. Based on the foregoing, the Court concludes that Kinney is not an "original source" of the information underlying the allegations upon which this action is based. Therefore, this Court lacks subject matter jurisdiction over the action pursuant to § 3730(e)(4)(A).[3]

Conclusion

Based on the foregoing, and all of the files, records and proceedings herein, **IT IS ORDERED** that

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[3] If Kinney were an "original source" and the Court had subject matter jurisdiction over the Complaint, it would still have to be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Kinney purports to sue the Defendants in their "individual capacities." Kinney has not alleged, however, that any of the Defendants personally benefitted from the alleged submission of false claims to Medicare. *See United States ex rel. Honeywell v. San Francisco Housing Auth.*, No. C99-1936 TEH, 2001 WL 793300 at *4 to *5 (N.D. Cal. Jul. 12, 2001). The allegations describing the Defendants' wrongful acts establish that they were acting as employees of HCMC at the time. The suit against them is really a suit against their governmental employer. Because Kinney cannot sue HCMC under the False Claims Act, neither can he sue the Defendants in their official capacity. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

1. The First Amended Complaint (Doc. No. 16) is hereby **STRICKEN** as an unauthorized supplemental pleading;

2. The Plaintiff's Request for the Entry of Default against Hennepin County (Doc. No. 26) is **DENIED AS MOOT**;

3. The Defendants' Request for Judicial Notice (Doc. No. 11) is **GRANTED IN PART** as to the Court file in *Kinney I*;

4. The Defendants' Motion to Dismiss (Doc. No. 9) is **GRANTED**; and

5. The Plaintiff's Complaint (Doc. No. 1) is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 5, 2002 /s/ Richard H. Kyle
RICHARD H. KYLE
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2193

United States of America, Ex Rel. James B. Kinney,	x	
Appellant,	x	Order Denying Petition for Rehearing and for Rehearing En Banc
vs.	x	
Rebecca Stoltz, et al.,	x	
Appellees.	x	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

July 16, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-2193

United States of America ex rel. James B. Kinney, Appellant,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
Rebecca Stoltz, an individual; Kelly Spratt; Geraldine Peterson, an individual; Jennifer Peterson, and individual, Appellees.	*	01-1287RHK

JUDGMENT

(Filed Jul. 25, 2003)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

May 5, 2003

Order Entered in Accordance with Opinion:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,
ex rel. James B. Kinney,

Plaintiff,

v.

Hennepin County Medical Center, a Minnesota non-profit corporation, and Hennepin Faculty Associates, a Minnesota non-profit corporation,

Defendants.

Civ. No. 97-1680 (RHK/JMM)
MEMORANDUM OPINION AND ORDER

(Filed Aug. 22, 2001)

Gary A. Weissman, Weissman Law Offices, Minneapolis, Minnesota; Phillip E. Benson and Linda R. MacLean, Benson Law Office, Anaheim Hills, California; and Donald R. Warren, San Diego, California, for Plaintiff James B. Kinney,

James L. Volling and Lianne Knych, Faegre & Benson L.L.P., Minneapolis, Minnesota, and David T. Schultz, Halleland, Lewis, Nilan, Sipkins & Johnson, Minneapolis, Minnesota, for Defendant Hennepin Faculty Associates.

Introduction

James B. Kinney brought this *qui tam* action against Defendants Hennepin County Medical Center ("HCMC") and Hennepin Faculty Associates ("HFA"), alleging that Defendants violated the False Claims Act ("FCA"), 31 U.S.C. § 3729, by submitting claims to Medicare and Medicaid for the payment of ambulance services that

Kinney alleges were false because the ambulance transports were not "medically necessary." Kinney alleges that (1) the Defendants knowingly caused false or fraudulent claims to be presented to the United States government; (2) the Defendants knowingly made false statements or records to get false or fraudulent claims paid by the United States government; and (3) the Defendants conspired to defraud the United States government.[1] By an Order dated January 22, 2001, the Court dismissed HCMC from the lawsuit in light of the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858 (2000).[2] This Court concluded that Hennepin County – and, hence, HCMC – is not a "person" for purposes of the FCA.

The remaining Defendant, HFA, is a non-profit corporation that provides, *inter alia*, emergency room physician staffing for HCMC. HFA has several motions pending before the Court. HFA initially brought a Motion for Judgment on the Pleadings pursuant to Rules 9(b) and 12(c) of the Federal Rules of Civil Procedure, asserting, among other things, that the *qui tam* provisions of the FCA violate the Take Care Clause of Article II of the Constitution. In response to that motion, Kinney stated that he had no objection to dismissal of the conspiracy

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[1] Kinney also asserted a claim for common law fraud. That Count was dismissed without prejudice for lack of standing on Kinney's part, with the understanding that the United States, were it to intervene, would be entitled to assert a common law fraud claim.

[2] In accordance with Rule 54(b) of the Federal Rules of Civil Procedure, the Court expressly directed the entry of judgment on the claims against HCMC, thus allowing Kinney to take an immediate appeal from that decision. No appeal was filed.

count. (Pl.'s Mem. Opp. Def.'s Mot. for J. on the Pleadings at 3; Hrg. Tr. at 11.) HFA later filed a summary judgment motion and, simultaneously, Kinney filed a motion for partial summary judgment. In connection with his summary judgment motion, Kinney filed two reply affidavits which HFA has moved to strike.

Background

I. The Parties

HCMC is a public, full service hospital that operates an ambulance service for the county, from which it derives income. HCMC's ambulances are called out on between 40,000 and 50,000 ambulance runs per year; about 20,000 of those patients are transported to HCMC itself, the remainder go to other metropolitan area hospitals. (Clinton Dep. at 30 (attached to Knych Aff. at Ex. F); Van Buren Aff. ¶ 4.) HFA is a non-profit corporation whose mission is in patient care, teaching, and research. (Fosbury Dep. at 11 (attached to Knych Aff. as Ex. B).) HFA is comprised of academic physicians. (*Id.*) HFA has a contract with HCMC to provide administrative, patient care, and teaching services at HCMC, including physician staffing for the emergency room at HCMC. (*See id.*)

Relator James B. Kinney has been employed for approximately twenty-two years as an HCMC paramedic. (Relator's Aff. ¶ 1 & n.1.) His performance as a paramedic has never been rated less than "fully capable" and has been most frequently rated "significantly above average." (*Id.* ¶ 2.) Kinney estimates that, during his years of employment at HCMC, he has personally responded to approximately 68,000 "911" calls as a paramedic. (*Id.* ¶ 1.)

II. The Ambulance Run Sheets

This case involves the "ambulance run sheets" prepared for each ambulance run made by an HCMC ambulance. (*See* Knych Aff. Ex. J (blank run sheet).) Paramedics complete the vast majority of the run sheet, (*see* Relator's Aff. ¶ 3; Van Buren Dep. at 21 (attached to Knych Aff. at Ex. K)), taking down demographic information about the patient, the symptoms observed vital signs measured at the scene, and the treatment administered. (Relator's Aff. ¶¶ 2, 3; Van Buren Dep. at 25.) The paramedics also check a box on the run sheet designating the level of service provided on that run. (*See* Lappe Dep. at 32 (attached to Knych Aff. at Ex. C); Van Buren Aff. ¶ 5; Relator's Aff. ¶ 3.)

The level of ambulance transport service at issue in this litigation is "ALS-Minor." The abbreviation "ALS" stands for "advanced life support" and correlates to the type of ambulance being used.[3] (*See* Mahoney Dep. at 19 (attached to Knych Aff. as Ex. E).) The term "minor" reflects the amount of care provided to the patient.[4]

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[3] An ALS ambulance rig has certain equipment on board and its crew has a certain level of training.

[4] HCMC describes ALS Minor care as follows: "Patient requires very little treatment, but should be seen at a hospital for further examination. Physical exam is done. Vital signs should be monitored for changes enroute. Bandaging and cold application may be done." Specific examples of the sorts of patients receiving ALS-Minor care include patients with minor cuts and bruises; patients with finger or toe sprains, strains, fractures, or dislocations; obstetric patients "without delivery or any complications prehospital"; patients with a headache but without a neurological deficit or hypertensive crises; seizure patients who are not in the midst of a seizure and who, after the paramedics' arrival, do not require an I.V. or airway management, and patients wanting transport only.

Kinney avers that he and his fellow paramedics have been trained that they should *not* describe the transport service as "ALS-Minor" if there is any chance that transporting the patient to the hospital *other than* by an ambulance would endanger the patient's health. (Relator's Aff. ¶ 4.)

Kinney's claim focuses on that portion of the lower right corner of the ambulance run sheet stating, "I certify that it was medically necessary to transport this patient by ambulance," and providing a space for the "attending physician's" signature and the date. Staff physicians at HCMC's emergency room would sign the "medical necessity" block on the yellow copy of the run sheet. Thus, to understand Kinney's claim, one must track the yellow copy of ambulance run sheets through HCMC's billing process.

An ambulance run sheet is a form in triplicate. When a patient arrived by ambulance at HCMC's emergency room, a paramedic would sign off on the run sheet and turn over the form to either a doctor or nurse who would sign a box as the "receiving MD/RN." (*See* Lappe Dep. at 38, 39-40; Van Buren Dep. at 26-27.) The copies of the run sheet would then be separated. The top sheet (the original) became part of the patient's chart. (*Id.* at 38; Van Buren Dep. at 23.) The second sheet (yellow) went, ultimately, to HCMC's billing department.[5] (Clinton Dep. at 41; Van

[5] Admissions staff in the emergency room would take demographic and insurance information from patients who arrived by ambulance to receive emergency services, either on an outpatient basis or as part of inpatient care. (Weeber Dep. at 7-8 (attached to Knych Aff. at Ex. G).) They would receive the yellow copy of the run sheet and, in registering the patient, would focus on the top part of the form where the patient's name, age, gender, and mailing address are located. (*Id.* at 13-14.) The

(Continued on following page)

Buren Dep. at 23.) The third sheet, if the patient had been transported to HCMC, went to HCMC's emergency medical services department (also known, at times, as the ambulance services department) for its permanent files. (Lappe Dep. at 38; Van Buren Dep. at 23-24.)

After the patient had been treated in the emergency room, the yellow copy of the run sheet went to a staff physician in the emergency room for a signature in the "medical necessity" block on the form. (Lappe Dep. at 42; Clinton Dep. at 34.) Dr. Mahoney stated that, as to some forms, he wrote "No" in the certification box and then signed it. (Mahoney Dep. at 29 (attached to Knych Aff. Ex. E).) Dr. Clinton likewise stated that he would, infrequently, write "No" or "No, not justified" in the "medical necessity" block. (Clinton Dep. at 33.) None of the emergency room physicians Kinney deposed understood that they were signing the "medical necessity" block to certify compliance with Medicare or Medicaid requirements. (*See* Clinton Dep. at 36-37; Mahoney Dep. at 28-29, 34.). Accordingly, the physicians Kinney deposed never evaluated "medical necessity" from the standpoint of whether the patient could have been transported to the HCMC emergency room by some means other than ambulance without endangering the patient's health. (*See* Clinton Dep. at 32, 46-48; Mahoney Dep. at 71-73.)

After leaving the emergency room, the run sheets were forwarded to the ambulance department. (G. Peterson Dep. at 38, 55-56.) The staff in the ambulance services

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admissions staff never checked to see whether the medical necessity block had been signed. (*Id.*)

department would review the run sheets and confirm whether the paramedics had recorded their mileage and had checked a level of service box. (*See* id. at 34.) No one in the ambulance services department ever checked to ensure that the medical necessity box had been signed before sending the run sheets on for coding and to the billing department. (*See id.* at 38-39.) Geraldine Peterson, manager of ambulance services at HCMC from 1992 until March of 2000, stated that she saw run sheets for HCMC patients or patients who were treated and released from HCMC on which the "medical necessity" block had not been signed. (*Id.* at 38.) Ms. Peterson also stated that she saw run sheets for ALS-Minor transports on which the "medical necessity" block had been signed; she did not know, however, whether those were for Medicaid or Medicare patients. (*Id.* at 58.)

For coding, it appears that HCMC generally used personnel from an outside agency called MBS to enter data from the run sheets into HCMC's patient accounting system. (Hansen Dep. at 90, 95-96 (attached to Knych Aff. at Ex. Q).) Each level of ambulance service identified on the run sheet had a corresponding internal HCMC billing code.[6] (*See* Knych Aff. Ex. J; *see also* Hansen Dep. at 79.) Data entry staff would input the internal HCMC ambulance service code into the patient accounting system. That code was entered into the HCMC computer system

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[6] The treatment levels and codes are as follows: Scene Treatment (code number 4100280-9); ALS-Minor (code number 4100401-1); ALS-Moderate (code number 4100402-9); ALS-Major (code number 4100403-7); ALS – Critical (code number 4100404-5); Oxygen (code number 4100406-0); and CPA Scene Treatment (code number 4100301-3). (*See* Knych Aff. Ex. J.)

regardless of whether the "medical necessity" block on that particular run sheet had been signed. (Zimmerman Aff. ¶ 3.)

HCMC programmed its patient accounting system automatically to convert the internal billing code for an "ALS-Minor" ambulance run – code number 4100401-1 – automatically into an HCPCS[7] code and a revenue code. (Stoltz Dep. at 77; Hansen Dep. at 79, 93.) The HCPCS code to correspond to the HCMC internal billing code was determined by the ambulance department. (Hansen Dep. at 97; Stoltz Dep. at 77.) The computer system posted the appropriate charges for ambulance transport services to a patient's account based on those HCPCS and revenue codes.[8] After the charges had been posted, the patient's account must wait to qualify for billing (typically based on a set number of days after registration or admission). (Stoltz Dep. at 98-99 (attached to Knych Aff. at Ex. I).) Once the waiting period was completed, bills and claims would be generated and printed. (*Id.* at 99.)

HCMC charged Medicare for ambulance transport services using a UB-92 electronic claim form. (Stoltz Dep. at 39.) HCMC's patient accounting system generated the electronic UB-92 Medicare claim form automatically. (*Id.* at 41, 59.) The UB-92 claim form stated the HCPCS code and corresponding revenue code for the services provided. (*Id.* at 59, 75; Hansen Dep. at 127-28, 155.) The electronic

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[7] The HCPCS codes are derived from the American Medical Association's Current Procedures Terminology Manual and Health Care Providers Code System.

[8] HCMC assigned revenue code 540 to all ambulance transport services, including ALS-Minor services. (Hansen Dep. at 128, 156.)

claim forms did not include any physician certifications and did not state that any such certifications were on file as part of the claims submission. (Stoltz Aff. ¶ 5.) Before a claim was sent to Medicare, a printed version of the UB-92 form was delivered to the billing department for review. (Stoltz Dep. at 99.) The billing department had the yellow copy of the run sheet, but staff in the billing department never reviewed the run sheet for completeness or to see if the "medical necessity" block and been signed. (*Id.* at 42-43, 49-50, 92.)

Analysis

I. HFA's Motion for Judgment on the Pleadings

A. Constitutionality of the FCA's *Qui Tam* Provisions

HFA's main argument in its Motion for Judgment on the Pleadings is that Kinney's continued prosecution of this action after the United States declined to intervene lacks any control by the Attorney General and its office of United States Attorneys and, therefore, violates the Take Care Clause of Article II of the Constitution. The Take Care Clause provides that the Executive "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. HFA contends that, by granting *qui tam* relators the power to prosecute actions on behalf of the United States, Congress has violated the separation of powers doctrine by undermining the constitutionally assigned powers of the Executive Branch. Specifically, HFA argues, the Executive's authority under the Take Care Clause includes the power to investigate and to prosecute claims relating to offenses against the United States. HFA claims that, by permitting a private relator to pursue a FCA claim on

behalf of the United States after it chooses not to intervene, the relator's suit abrogates the Executive's authority to control litigation relating to harms suffered by the United States.

In support of this argument, HFA relies principally on *Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999), in which a panel of the Fifth Circuit held that the *qui tam* provisions of the FCA violated the separation of powers doctrine under both the Take Care and the Appointments Clauses of Article II of the Constitution.[9] On May 25, 2001, however, the Fifth Circuit Court of Appeals, sitting en banc, reversed the panel's decision in *Riley*. *Riley v. St. Luke's Episcopal Hosp.* ("*Riley II*"), 252 F.3d 749, 757 (5th Cir. 2001) (en banc).[10] After reviewing the Executive Branch's control over *qui tam* actions initiated under the FCA, *id.* at 753-57, the Fifth Circuit held that "the *qui tam* provisions of the FCA do not violate the principle of separation of powers by impermissibly infringing upon the constitutional duty of the Executive to take care that the laws are faithfully executed under the Take Care Clause of Article II." *Id.* at 758. Judges Smith and DeMoss filed a lengthy dissent setting out in great detail

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[9] The Appointments Clause states that the Executive "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provide for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[10] As of the date of this Memorandum Opinion and Order, no petition for certiorari from the en banc decision had been filed.

why, in their view, the *qui tam* provisions impermissibly encroach on the Executive's responsibilities under the Take Care Clause. The Court has reviewed the en banc opinion in *Riley II* and the dissent, and is persuaded that the majority's reasoning is correct. The Court will not dismiss Kinney's Amended Complaint on grounds of unconstitutionality.

B. Dismissal Based upon the Court's Prior Ruling Regarding HCMC

The remaining counts of the Amended Complaint allege that a "false or fraudulent claim" was either (1) presented to the United States government (under § 3729(a)(1) of the FCA), or (2) paid by the government (under § 3729(a)(2) of the FCA). HFA urges the Court to construe the phrase "false or fraudulent claim" – not defined by the statute – to mean a claim for payment to the United States government *that is itself subject to liability* under the FCA. HFA then argues that, because HCMC is not subject to liability under the FCA, the claims that HCMC submitted to the United States government cannot be considered "false or fraudulent claims." The only case HFA cites regarding what a "false or fraudulent claim" is comes from the Fourth Circuit, in which the Court of Appeals stated that "[t]he [FCA] attaches liability, not to the underlying fraudulent activity or to the United States government's wrongful paying, but to the 'claim for payment.'" *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999).

The Court finds both HFA's argument and the Fourth Circuit's reasoning in *Harrison* on this point unpersuasive.

The plain language of § 3729(a) of the FCA is unambiguous: liability is imposed on the *person* who engages in prohibited acts, not the claim. This Court's earlier ruling that HCMC is not a "person" for purposes of imposing liability under the FCA did not resolve either (a) whether HFA is a person subject to FCA liability, or (b) whether the claims presented to Medicare or Medicaid for payment in this case were false or fraudulent.

II. HFA's Motion to Strike the Benson and Powell Affidavits

Before addressing the merits of the summary judgment motions, one motion regarding the record needs to be addressed. Together with his reply brief in support of his partial summary judgment motion, Kinney submitted the affidavits of Phillip Benson and Dennis Powell. HFA has objected to these affidavits and moved that they be stricken.

Kinney offers the affidavit of Dennis W. Powell, a veteran paramedic for HCMC, to refute HFA's assertion that HFA emergency room physicians only "sometimes" signed certifications of medical necessity. Powell avers that HFA physicians *routinely* signed *all* medical necessity certifications for ambulance transports to HCMC and did so pursuant to a policy imposed by HCMC. HFA argues that this affidavit should be stricken as an improper reply affidavit. HFA points out that, in its opening memorandum in support of its motion for summary judgment, it presented evidence tending to establish that HFA physicians signed only *some* of the certifications on ambulance run sheets. Thus, it did not raise this factual issue for the first time in its opposition memorandum.

Kinney asserts that, when HFA incorporated the factual assertions from its opening summary judgment memorandum into its memorandum in opposition to Kinney's motion, HFA opened the door to this rebuttal evidence. That argument is disingenuous at best. As Rule 56(e) of the Federal Rules of Civil Procedure plainly states, "[w]hen a motion for summary judgment is made and supported as provided in this rule . . . the adverse party's *response*, by affidavits or as otherwise provided in this rule, *must* set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e) (emphasis added). If Kinney had evidence available which tended to create a genuine issue of material fact as to the frequency and regularity with which the "medical necessity" blocks on the run sheets were signed, the time to have presented such evidence was in opposition to HFA's motion for summary judgment. There is nothing "new" in HFA's memorandum opposing Kinney's summary judgment motion to warrant submitting the affidavit from Powell with Kinney's reply memorandum. A cross-motion for summary judgment is not a license to sandbag. Powell's affidavit will be stricken.

The second affidavit is from one of Kinney's counsel, Phillip Benson. Over ten pages long, the majority of the affidavit – more than six-and-a-half pages – is devoted to addressing two "misrepresentations of fact" allegedly made by HFA. The first of these involves whether only some or all medical necessity certifications on ambulance run sheets were signed. As discussed above, the time to have addressed that issue was prior to Kinney's reply brief. Kinney knew HFA maintained that certifications were "sometimes" signed from the first pages of HFA's opening memorandum.

The second "factual misrepresentation" Benson's affidavit addresses is whether deposition testimony cited by Kinney in his initial brief in support of his partial summary judgment motion supports his factual assertions that (a) "in order to get paid by Medicare, HFA physicians signed the medical necessity block of the ambulance run sheet for patients delivered to HCMC"; and (b) that "HCMC instructed its paramedics not to check ALS-Minor if the use of other methods of transportation is contraindicated." Benson quotes extensively in his affidavit from the deposition testimony that Kinney had cited (despite the fact that the testimony is already before the Court as an attachment to an earlier memorandum). HFA contends that this portion of Benson's affidavit is argument dressed up as "facts." The Court agrees.

The balance of Mr. Benson's affidavit addresses the twelve exhibits attached to his affidavit, most of which are copies of the texts of the 1990 and 2001 versions of various statutes, regulations, and policy manuals. Mr. Benson avers that the relevant language in these statutes, regulations, et cetera have not changed over the intervening eleven years. In Kinney's memorandum in opposition to HFA's Motion for Summary Judgment, however, he already argued that HFA had contended that physician certifications were not needed for emergency ambulance transports based upon a regulatory provision that was changed in 1999. He further argued, at great length, that HFA failed to point out relevant statutory and regulatory language and that such language has remained unchanged during the relevant time period – 1991 to 1998.

The time for Kinney to have presented evidence in support of that argument was in response to HFA's motion. Benson's reply affidavit will also be stricken.[11]

III. The Parties' Cross-Motions for Summary Judgment

A. Standard of Decision

Summary judgment is proper if, viewing the record in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of showing that the materials facts in the case are undisputed. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Moms v. City of St. Paul Dep't of Fire & Safety Servs.*, 224 F.3d 735, 738 (8th Cir. 2000). The court must view the evidence, and the inferences which may be reasonably drawn from it, in the light most favorable to the nonmoving party. *See Graves v. Arkansas Dep't of Fin. & Admin.*, 229 F.3d 721, 723 (8th Cir. 2000); *Calvit v. Minneapolis Pub. Schs.*, 122 F.3d 1112, 1116 (8th Cir. 1997).

The nonmoving party may not rest on mere allegations or denials, but rather must demonstrate the existence of specific facts that create a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Krenik v. County of Le Sueur*, 47 F.3d 953, 957 (8th

[11] Even if the Court considered the affidavits of Benson and Powell (to the extent they present admissible evidence), it would not change the analysis below with respect to the cross-motions for summary judgment.

Cir. 1995). The court does not weigh facts or evaluate the credibility of affidavits and other evidence on a motion for summary judgment. *See Liberty Lobby*, 477 U.S. at 249. The nonmovant, however, cannot avoid summary judgment in favor of the movant merely by pointing to some alleged factual dispute between the parties. Instead, any fact alleged to be in dispute must be "outcome determinative under prevailing law," that is, it must be material to an essential element of the specific theory of recovery at issue. *See Dancy v. Hyster Co.*, 127 F.3d 649, 652 (8th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992).

B. Payments by Medicare and Medicaid for Ambulance Services

Medicare Part B covers, with some limited exceptions that are not relevant to this case, "medical and other health services." 42 U.S.C. § 1395k(a)(2)(B). "Medical and other health services" are defined to include "ambulance service where the use of other methods of transportation is contraindicated by the individual's condition, but only to the extent provided in regulations." 42 U.S.C. §§ 1395k(b); 1395x(s); *see also* 42 C.F.R. § 410.10(i). As a condition for the payment of services covered by § 1395k(a)(2), a physician must certify that "in the case of medical and other health services . . . such services are or were medically required." 42 U.S.C. § 1395n(a)(2)(B).

Medicaid is funded by both the federal government and state governments. Minnesota's Medical Assistance program covers transportation costs incurred "solely for obtaining emergency medical care or transportation costs incurred by nonambulatory persons in obtaining

emergency or nonemergency medical care when paid directly to an ambulance company, common carrier, or other recognized providers of transportation services." Minn. Stat. § 256B.0625, subd. 17(a). Medical assistance also covers "special transportation," if the service provider "receives and maintains a current physician's order by the recipient's attending physician certifying that the recipient has a physical or mental impairment that would prohibit the recipient from safely accessing and using a bus, taxi, other commercial transportation, or private automobile." The parties appear to agree that, before 1999, the rules implementing Minnesota's Medicaid program stated that "the medical necessity of the ambulance service . . . must be documented by the state report required under Minnesota Statutes § 144E.17." Until section 144E.17 of the Minnesota Statutes was repealed in 1999, HFA documented "medical necessity" for purposes of Medicaid with signatures in the "medical necessity" blocks on the run sheets.

C. Kinney's Remaining FCA Claims

Kinney and HFA have brought cross-motions for summary judgment on the issue of HFA's liability under § 3729(a)(1) and (2) of the FCA for claims submitted by HCMC to Medicare for the payment of ambulance transport charges, specifically for ALS-Minor ambulance services. Section 3729 provides in relevant part:

> Any person who
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> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed

> Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> * * *
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

31 U.S.C. § 3729(a). The FCA defines "knowing" and "knowingly" to mean "that a person, with respect to information, (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. § 3729(b). The FCA does not require proof of a specific intent to defraud.

Neither party has clearly addressed the differences in the essential elements of a claim under § 3729(a)(1) and the essential elements of a claim under § 3729(a)(2). The actions prohibited by each section, however, are plainly different. Accordingly, this memorandum opinion considers each statutory claim separately.

1. Liability under § 3729(a)(1)

As stated above, § 3729(a)(1) of the FCA imposes liability on any person who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." Kinney does not allege that HFA

itself presented a false or fraudulent claim for payment or approval, nor would the record support such a finding.[12] It is undisputed that HCMC presented its Medicare claims for the challenged ambulance transport services electronically, using a UB-92 claim form. Therefore, Kinney cannot establish liability based on a theory that HFA "knowingly present[ed] . . . a false or fraudulent claim for payment or approval."

Kinney therefore must establish, under § 3729(a)(1), that HFA *knowingly caused a false or fraudulent claim to be presented* to the United States government for payment or approval. To establish such a claim, Kinney must prove that (1) HFA caused HCMC to present a claim to the United States government; (2) the claim presented was false or fraudulent; and (3) HFA knew that the claim presented was false or fraudulent. *See United States v. Basin Elec. Power Co-op*, 248 F.3d 781, 803 (8th Cir. 2001). The parties devote considerable briefing to the issue of whether the Medicare statutes and regulations require a physician certification of medical necessity in order for Medicare to pay for ambulance transport services. The parties also devote considerable briefing to the question of whether HFA's physicians – by signing the "medical necessity" blocks on ambulance run sheets – "caused"

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[12] "[A] claim againt the government normally connotes a demand for money or for some transfer of pubic property." *Unied States v. McNinch*, 356 U.S. 595, 599 (1958) (quoting *United States v. Tieger*, 234 F.2d 589, 591 (3d. Cir. 1956)). The classic example of a false claim under the FCA is a false invoice or bill for goods or services. *See, e.g., United States v. Bornstein*, 423 U.S. 303, 309 (1976). The term, however, applies more generally to other demands for government funds. *United States v. Rivera*, 55 F.3d 703, 709 (1st Cir. 1995).

HCMC to submit the challenged claims to Medicare for payment. The Court begins with "causation."

Kinney's causation argument, in a nutshell, is that "HFA makes it all possible by having its physicians falsely certify ALS-Minor ambulance runs as 'medically necessary' when they do not meet either the Medicare or Medicaid criteria for medically necessary." (Relator Aff. ¶ 10.) Kinney argues that Medicare and Medicaid only reimburse ambulance transport services that are "medically necessary" – i.e., that are provided because any other means of transporting the patient presents a danger to the patient's health. Kinney contends that the purpose of the "medical necessity" block on the run sheets is to certify to Medicare and Medicaid that the ambulance transport services provided on a particular run satisfy those programs' "medical necessity" requirements. By definition, Kinney asserts, an ALS-Minor run cannot satisfy the definition of "medically necessary" in the Medicare and Medicaid regulations. Therefore, Kinney argues, a signature in the "medical necessity" block for such runs is false and, by signing the "medical necessity" blocks for ALS-Minor ambulance runs that were submitted to Medicare and Medicaid for payment, the HFA emergency room physicians caused the United States government to pay on those claims.

HFA argues that Kinney cannot prove that HFA's certifications of "medical necessity" either "brought about" or "led to" HCMC submitting false or fraudulent Medicare or Medicaid claims for ambulance services. HFA contends that HCMC presented claims for ambulance transport services to Medicare and Medicaid *regardless* of whether an HFA doctor had signed the "medical necessity" block. Furthermore, HFA contends, nowhere in the course of

preparing the Medicare or Medicaid claims for the challenged ambulance transport services did HCMC note – or even consider – whether the physician certification block had been signed. Finally, HFA asserts that the electronic claim forms provided no information about certifications of "medical necessity."

Kinney replies that HFA has mischaracterized the "causation" element required under the FCA. Kinney contends that the real question is whether HFA's conduct was "causally connected" to the ultimate submission of a false claim. Kinney argues that the causation element is met if (1) the Medicare statutes and/or regulations call for a physician certification of "medical necessity"; and (2) an HFA physician signs the certification block on the ambulance run sheet, certifying that the ambulance transport was "medically necessary." The Court disagrees.

Kinney contends that this case is analogous to *United States v. Krizek,* 111 F.3d 934 (D.C. Cir. 1997), and *United States v. Mackby*, 243 F.3d 1159 (9th Cir. 2001).[13] In *Krizek*,

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[13] Kinney also argued for the first time in his reply brief that the "causation" issue in this case is controlled by the Supreme Court's 1943 decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In *Hess*, the respondents were electrical contractors who engaged in collusive bidding, including local municipalities and school districts in Pennsylvania to enter into contracts with them. A large portion of the respondents' pay ultimately came from the federal government's Public Works Administration. The Supreme Court reasoned that "by their conduct, the respondents *thus caused the government to pay the claims of the local sponsors in order that they might in turn pay respondents* under contracts found to have been executed as a result of the fraudulent bidding." *Hess*, 317 U.S. at 543 (emphasis added). The contractors' fraud caused the local sponsors to pass along "every swollen estimate which was the basic cause for payment of every dollar paid by the PWA

(Continued on following page)

the United States sued a psychiatrist and his wife, who worked in her husband's practice and maintained his billing records, alleging that they had submitted over 8,000 false claims for payment by Medicare and Medicaid. *Krizek*, 111 F.3d at 936. The United States alleged that the Krizeks had sought payment for more extensive treatments than were, in fact, rendered.[14] A five digit code on the Medicare claim form which the Krizeks submitted identified the services for which payment was being sought. *Id.* The evidence established that the Krizeks improperly used the code assigned to 45-50 minute individual psychotherapy sessions where shorter, less involved treatment was in fact provided. *Id.* As a result, Dr. Krizek on several occasions submitted claims for over 21 hours of patient treatment within a 24-hour period. *Id.* at 936-37. In affirming the judgment against the Krizeks, the court of appeals noted

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into the joint fund for the benefit of respondents." *Id.* Unlike *Hess*, there is no evidence here that the HFA emergency room physicians' signatures on ambulance run sheets set in motion a chain of events that resulted in claim forms being submitted to Medicare for ALS-Minor ambulance runs. As Kinney has established, the claim forms identified the disputed ambulance services according to HCPCS and revenue codes that were appropriate only for "medically necessary" ambulance services; those codes were selected, however as the result of HCMC's actions, not the signatures of HFA physicians on ambulance run sheets. Accordingly, *Hess* is also distinguishable.

[14] The United States also alleged that the Krizeks had submitted claims seeking payment for services that were medically unnecessary. After a three week bench trial, however, the district court held that the United States had not established that the Krizeks had submitted claims for unnecessary services. *Krizek*, 111 F.3d at 936.

> that Dr. Krizek is not less liable than his wife for these false submissions. As noted, an FCA violation may be established without reference to the subjective intent of the defendant. Dr. Krizek delegated to his wife authority to submit claims on his behalf. In failing utterly to review the false submissions, he acted with reckless disregard.

Krizek, 111 F.3d at 942. Kinney relies upon this passage in arguing that HFA is as liable as HCMC for the allegedly false claims that were submitted for the payment of ambulance transport fees. Kinney argues that, just as Dr. Krizek was ultimately responsible for reviewing the claims presented to Medicare, so HFA was ultimately responsible for properly certifying medical necessity of the ambulance transport services that were billed to Medicare and Medicaid. Significant to the decision in *Krizek*, however, was the fact that Dr. Krizek had *delegated* to his wife the authority to submit Medicare claims. HFA did not delegate to HCMC the authority to submit claims for ambulance transport fees. HFA had no control over the content of the claims submitted to Medicare and Medicaid. Nor did HFA have any apparent right to review the claim forms being submitted to Medicare and Medicaid. Thus, *Krizek* is distinguishable.

The other case Kinney relies upon is *United States v. Mackby*,[15] in which the owner and managing director of a

[15] On August 16, 2001, the Ninth Circuit Court of Appeals granted the government's petition for rehearing and withdrew the opinion published at 243 F.3d 1159. The substituted opinion will be published in the Federal Reporter (Third). The following discussion of *Mackby* is taken from the substituted opinion.

physical therapy clinic was found liable for knowingly causing false claims to be submitted to Medicare by instructing the clinic's billing company and office manager to use his physician father's provider identification number (PIN) on claim forms used to bill Medicare for physical therapy services provided at the clinic. *United States v. Mackby*, ___ F.3d ___, 2001 WL 921177 at *1 (9th Cir. Aug. 16, 2001). Medicare pays for physical therapy services when those services are rendered by a physician, by a qualified employee of a physician or physician directed clinic, or by a qualified physical therapist in independent practice. *Id.* Dr. Mackby's PIN was placed in boxes 24k and 33 of the reimbursement form, leading Medicare to believe that the physical therapy services for which the clinic was submitting claims had been provided by Dr. Mackby or at least "incident to" his supervision. *Id.* *Mackby* is distinguishable.

In this case, the information on HCMC's UB-92 claim form that would lead Medicare to believe ALS-Minor ambulance transport services were "medically necessary" was the HCPCS and revenue codes. There is no evidence that HFA *instructed* HCMC to use those codes. Nor is there any evidence that a physician's signature in the "medical necessity" box on the run sheet triggered the selection of the HCPCS and revenue codes that ultimately appeared on the claim forms. Indeed, the evidence presented by Kinney clearly establishes that *HCMC* chose which HCPCS and revenue codes to assign to ALS-Minor ambulance runs. Furthermore, Kinney has successfully established as undisputed fact that HCMC's computerized patient accounting system *automatically* converted the internal ALS-Minor transport code into a HCPCS code and a revenue code that implicitly represented that the

ambulance services provided were medically necessary. This conversion occurred regardless of whether the "medical necessity" box on a run sheet has been signed. Kinney's theory of causation does not square either with the cases cited or the facts underlying HCMC's billing and claim generation process. The Court concludes that Kinney has failed to establish that there is a jury issue on an essential element of his claim under § 3729(a)(1). Accordingly, the Court will dismiss that claim.

2. Liability Under § 3729(a)(2)

Section 3729(a)(2) imposes liability on a person for knowingly

> (a) *making* a false record or statement to get a false or fraudulent claim paid or approved by the Government;
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> (b) *using* a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (c) *causing a false record or statement to be made* to get a false or fraudulent claim paid or approved by the Government; and
>
> (d) *causing a false record or statement to be used* to get a false or fraudulent claim paid or approved by the Government.

Under § 3729(a)(2), Kinney alleges that HFA knowingly *made* or *caused to be made* false records or statements – namely, certifications of "medical necessity" on ALS-Minor ambulance transports – to get HCMC's claim for such ambulance services paid.

A cause of action under § 3729(a)(2) requires proof of the following elements: "(1) the defendant made a record or statement in order to get the government to pay money; (2) the record or statement was false or fraudulent; and (3) the defendant knew it was false or fraudulent." *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999).[16] Furthermore, to impose liability on a defendant for making a false statement or record "to get a false or fraudulent claim paid by the Government," the defendant's statement or record needs to be *material* to getting the claim paid. *United States v. Southland Mgmt. Corp. Inc.*, 95 F. Supp.2d 629, 637 (S. D. Miss. 2000) (citing *Kungys v. United States*, 485 U.S. 759, 770 (1988)). The question of materiality is a mixed question of law and fact, for the court to decide. *See United States ex rel. Berge v. Board of Trustees.* 104 F.3d 1453, 1460 (4th Cir.), *cert denied*, 522 U.S. 916 (1997).

Among the arguments made in support of its summary judgment motion, HFA contends that the physician's signature on the ambulance run sheet did not "cause" HCMC to get paid on the claim submitted to Medicare.

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[16] *See also, United States ex rel. Bustamante v. United Way/Crusade of Mercy, Inc.*, No. 98C5551, 2000 WL 690250 at *4 (N.D. III. May 25, 2000) (holding that, with respect to the second and third elements, both the record or statement and the claim must be false or fraudulent; and the defendant must know that both the record or statement and the claim were false or fraudulent); *United States ex rel. Showell v. Philadelphia AFL, CIO Hosp. Ass'n*, No. Civ. A. 98-1916, 2000 WL 424274 at *5 (E.D. Pa. Apr. 18, 2000); *United States ex rel. Mikes v. Straus*, 84 F.Supp.2d 427, 432 (S.D.N.Y. 1999); *United States v. United Techs Corp.* 51 F. Supp. 2d 167, 195 (D. Conn. 1999); *Witkins ex rel. United States v. Ohio*, 885 F. Supp. 1055, 1059 (S.D. Ohio 1995).

This argument addresses a fundamental problem with Kinney's § 3729(a)(2) claim. Section 3729(a)(2)

> imposes liability on those who make or use "a false record or statement to get a false or fraudulent claim paid or approved by the Government." *If a record or statement were not material to the Government's decision to pay or approve a claim. It could not be used "to get" such a claim paid or approved.*

Southland Mgmt. Corp., Inc., 95 F. Supp. 2d at 637 n.8 (quoting from Clarence T. Kipps, Jr., Robert K. Huffman & Peter B. Hutt, II, *Materiality as an Element of Liability Under the False Claims Act*, N98CFCB ABA-LGLED B-38-39 (1998)) (emphasis added.) In this case, the evidence before the Court is that the government agencies administering the Medicare and Medicaid programs received no information as to whether an HFA physician had signed the run sheets to certify that the ambulance services were "medically necessary."[17] As Kinney has established, any

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[17] In that respect, this case is also distinguishable from a case prevalently cited by Kinney in his opening memorandum in support of partial summary judgment: *American Ambulance Services of Pennsylvania, Inc. v. Sullivan*, 761 F. Supp. 1211 (E.D. Pa. 1991) ("AASPI"). The ambulance service provider not only submitted claim forms to Medicare, Part B, for reimbursement, it also attached and submitted Supplemental Documentation for Ambulance Transportation ("SDFAT") forms signed by the patients' doctors that expressly certified, *inter alia*, that the patient's physical condition required movement by a stretcher and that transportation by a means other than ambulance was contraindicated – i.e., medically necessary. *AASPI*, 761 F. Supp. at 1214. In the present case, no such documentation was submitted with HCMC's claim forms. The Court also notes that *AASPI* is not a FCA case, but rather is a challenge by AASPI to the method by which Medicare reimbursement decisions were made. *Id.* at 1215.

statements made to the United States government (or any state agency distributing federal funds) regarding the "medical necessity" of ambulance transports were inherent in the HCPCS and revenue codes that HCMC assigned to the ALS-Minor ambulance services. Those codes were assigned regardless of whether an emergency room physician had signed the "medical necessity" block on the ambulance run sheet. The presence or absence of a signature on a run sheet had no effect on, and no tendency to effect, whether the claim was paid by Medicare or Medicaid. The Court concludes that Kinney has failed to establish a genuine issue of material fact with respect to an essential element of his claim under § 3729(a)(2) of the FCA. That claim will also be dismissed.

Conclusion

Based on the foregoing, and all of the files, records and proceedings herein, **IT IS ORDERED THAT**

1. Count III of the Amended Complaint – the conspiracy count – is **DISMISSED WITH PREJUDICE**;

2. Defendant HFA's Motion for Judgment on the Pleadings (Doc. No. 113) is **DENIED**.

3. Defendant HFA's Motion to Strike the Affidavits of Dennis Powell and Phillip Benson (Doc. No. 162) is **GRANTED**;

4. Plaintiff's Motion for Partial Summary Judgment (Doc. No. 142) is **DENIED**;

5. Defendant HFA's Motion for Summary Judgment (Doc. No. 136) is **GRANTED**; and

6. The Relator's Amended Complaint is hereby **DISMISSED WITH PREJUDICE.**

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: August 22, 2001 /s/ Richard H. Kyle
RICHARD H. KYLE
United States District Judge